



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[EPA-R09-UST-2022-0197; FRL-9571-01-R9]

Approval of State Underground Storage Tank Program Revisions; Hawaii

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of final determination on the State of Hawaii's application for final approval.

SUMMARY: Hawaii has applied to the Environmental Protection Agency (EPA) for updated approval of changes made to its Underground Storage Tank Program under the Resource Conservation and Recovery Act, as amended, since the previous approval of Hawaii's Underground Storage Tank Program in September 2002. The EPA has reviewed Hawaii's application and has determined that these changes satisfy all requirements needed to qualify for the requested updated approval. The EPA is correcting one citation identified as a result of public comment received on the proposal to approve Hawaii's Underground Storage Tank Program that was published in August 2020. All other aspects of the August 2020 proposed State Program Approval remain the same. Therefore, the EPA is granting final approval to the State of Hawaii to operate its Underground Storage Tank Program for petroleum and hazardous substances.

DATES: This final approval is effective at 1:00 p.m. HST [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Lyndsey Tu, Underground Storage Tanks Program Office, U.S. EPA, Region 9, Tu.Lyndsey@epa.gov, (415) 972-3269.

SUPPLEMENTARY INFORMATION:

I. Approval of Revisions to Hawaii's Underground Storage Tank Program

A. Background

Section 9004 of the Resource Conservation and Recovery Act, as amended, (RCRA), 42 U.S.C. 6991c, authorizes the EPA to approve a State Underground Storage Tank (UST) Program

to operate in the State in lieu of the Federal UST program, subject to the authority retained by EPA in accordance with RCRA. Program approval may be granted by EPA pursuant to RCRA Section 9004(b), if EPA finds that the State program: (1) is “no less stringent” than the Federal program for the seven elements set forth at RCRA Section 9004(a)(1) through (7); (2) includes the notification requirements of RCRA Section 9004(a)(8); and (3) provides for adequate enforcement of compliance with UST standards of RCRA Section 9004(a). Note that RCRA Sections 9005 (on information-gathering) and 9006 (on Federal enforcement) by their terms apply even in states with programs approved by EPA under RCRA Section 9004. Thus, EPA retains its authority under RCRA Sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions in approved states. With respect to such an enforcement action, EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than the approved state analogues to these provisions.

B. What decisions has EPA made in this approval?

On October 8, 2018, in accordance with 40 CFR 281.51(a), Hawaii submitted a complete program revision application seeking approval for its UST program revisions corresponding to the EPA final rule published on July 15, 2015 (80 FR 41566), which finalized revisions to the 1988 UST regulations and to the 1988 state program approval regulations. As required by 40 CFR 281.20, the State submitted the following: a transmittal letter from the Governor requesting approval, a description of the program and operating procedures, a demonstration of the State’s procedures to ensure adequate enforcement, a Memorandum of Agreement outlining the roles and responsibilities of EPA and the implementing agency, a statement of certification from the Attorney General, and copies of all relevant State statutes and regulations. EPA reviewed the Hawaii application for updated UST Program approval and, on August 14, 2020 (85 FR 49611), issued a tentative determination that the revisions to Hawaii’s UST program are equivalent to, consistent with, and no less stringent than the corresponding Federal requirements in subpart C

of 40 CFR part 281, and that the Hawaii program provides for adequate enforcement of compliance (40 CFR 281.11(b)). EPA received public comment on its tentative determination and, as a result, has made one correction to the scope of the approval as proposed, which is described in Section I.C. of this document, below. Therefore, EPA grants Hawaii approval to operate its UST program with the changes described in the program revision application as outlined in EPA's August 14, 2020 tentative determination and amended by this notification. Specifically, as noted below, EPA finds that Hawaii Administrative Rules (HAR) Section 11-280.1-67 is equivalent to and part of the approved Hawaii UST program, but HAR Section 11-280.1-65.1 is broader in scope than the Federal UST program and is not a part of the approved Hawaii UST program.

C. Significant Public Comments and Responses

EPA received one significant public comment on its proposed approval of the updated Hawaii UST program within the public comment period.

Comment: In the "Authorization of Underground Storage Tank Program Revisions: Hawaii" under H. "Where are the State's revised rules different from the Federal rules," the text reads: "[Hawaii Administrative Rules (HAR)] Section 11-280.1-67 requires public notification in the event of a confirmed release. This requirement is broader in scope than the Federal UST program, which only requires public notification when an implementing agency requires a corrective action plan." This is not correct. HAR Section 11-280.1-67 is titled "Public participation for corrective action plans" and does NOT require public notification in the event of a confirmed release, but instead only when a corrective action plan is required. This is in line with EPA's rules.

Response: EPA agrees with this comment. HAR Section 11-280.1-67 does not require public notification in the event of a confirmed release but does require public participation when a corrective action plan is required. This aspect of Hawaii's program is not broader in scope than the Federal program and is in alignment with EPA's rules. However, in its August 2020

proposal, EPA cited HAR Section 11-280.1-67 incorrectly and should have cited HAR Section 11-280.1-65.1 instead. HAR Section 11-280.1-65.1 requires notification of members of the public directly affected by a confirmed release. See also Hawaii revised statute 342L-35(4). There is no counterpart in the Federal regulations for HAR Section 11-280.1-65.1. As a result, this final approval includes HAR Section 11-280.1-67, which has a counterpart at 40 CFR 280.67. However, this final approval does not include HAR Section 11-280.1-65.1, which EPA finds is broader in scope than the Federal program.

Additionally, EPA received a set of comments outside of the public comment period. This set of comments was submitted by email to the Underground Storage Tanks Program at EPA Region 9 shortly after the comment period closed. The full text of this set of comments is included as a part of this docket to ensure the public has access to this set of comments as part of the record for this decision. The comments, which are focused on the State's and EPA's underlying requirements for field-constructed tanks, do not implicate EPA's decision whether to approve Hawaii's revised UST Program. UST State Program Approval is intended for states to obtain the authority to operate their programs in lieu of the Federal program and is not an opportunity to re-open comment on either the underlying Federal or state rules. The public comment period for the 2015 Federal UST regulations closed on April 16, 2012, and the public comment period for the Hawaii UST regulations closed on June 5, 2018.

II. Codification

A. What is codification, and will EPA codify Hawaii's UST program?

Codification is the process of placing citations and references to the state's statutes and regulations that comprise the state's approved UST program into the Code of Federal Regulations. EPA does this by adding those citations and references to the approved state rules in 40 CFR part 282. EPA is not codifying the approval of Hawaii's changes at this time. However, EPA intends to amend 40 CFR part 282, subpart B, to reflect the updated approval of Hawaii's program changes at a later date.

III. Statutory and Executive Order (E.O.) Reviews

This action only applies to Hawaii's UST Program requirements pursuant to RCRA Section 9004 and imposes no requirements other than those imposed by state law. It complies with applicable EOs and statutory provisions as follows:

A. Executive Order 12866 Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action approves state requirements for the purpose of RCRA Section 9004 and imposes no additional requirements beyond those imposed by state law. Therefore, this action is not subject to review by OMB.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as this approval of Hawaii's revised underground storage tank program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

C. Unfunded Mandates Reform Act and Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Because this action approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, and because there are no federally recognized Tribes within the State, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

D. Executive Order 13132: Federalism

This action will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves state requirements as part of the State RCRA Underground Storage Tank Program without altering the relationship or the distribution of power and responsibilities established by RCRA.

E. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant, and it does not make decisions based on environmental health or safety risks.

F. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a “significant regulatory action” as defined under Executive Order 12866.

G. National Technology Transfer and Advancement Act

Under RCRA Section 9004(b), EPA grants a state’s application for approval as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a state approval application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

H. Executive Order 12988: Civil Justice Reform

As required by Section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in taking this action, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

I. Executive Order 12630: Governmental Actions and Interference with Constitutionally

Protected Property Rights

EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the action in accordance with the “Attorney General’s Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings” issued under the Executive order.

J. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). “Burden” is defined at 5 CFR 1320.3(b).

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this action approves pre-existing state rules which are at least equivalent to, consistent with, and no less stringent than existing Federal requirements, and imposes no additional requirements beyond those imposed by state law, and there is no anticipated significant adverse human health or environmental effects, the action is not subject to Executive Order 12898.

L. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, generally provides that, before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. This action is not considered a “rule” within the meaning of 5 U.S.C. 804, since it does

not substantially affect the rights or obligations of non-agency parties. However, this action will be effective at 1:00 p.m. HST [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], because it is a final approval.

Authority: This action is issued under the authority of Sections 2002(a), 7004(b), and 9004, 9005 and 9006 of RCRA, also known as the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6974(b), and 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 281

Environmental protection, Administrative practice and procedure, Hazardous substances, Petroleum, Reporting and recordkeeping requirements, State program approval, Underground storage tanks.

Dated: February 26, 2022.

Martha Guzman Aceves,
Regional Administrator,
Region 9.

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